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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 DIANE BUTTE,

11 Plaintiff,

12 v.

13 STONEBRIDGE LIFE INSURANCE
14 COMPANY, *et al.*,

15 Defendants.

Case No. 2:10-CV-00344-KJD-RJJ

ORDER

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17 Before the Court is Defendant Stonebridge Life Insurance Company's Motion for Summary
18 Judgment (#25). Plaintiff filed an opposition (#29) and a Counter-Motion for Partial Summary
19 Judgment (#30). Stonebridge filed a reply (#34) to the opposition and an opposition to the Counter-
20 Motion (#36), and Plaintiff filed a reply (#39).

21 **I. Background**

22 Robert D. Butte, Jr. died of methadone intoxication on June 20, 2004. Mr. Butte was the
23 named insured under a \$30,000 Accidental Death and Dismemberment Policy (the "Policy") issued
24 by Stonebridge. Plaintiff is Mr. Butte's surviving spouse. On June 4, 2008, Plaintiff submitted a
25 "proof of Accidental Death – Affidavit of Claimant" and Mr. Butte's death certificate to Stonebridge
26 to initiate a claim under the policy. On June 12, 2008 Stonebridge responded to Plaintiff by letter,

1 indicating several problems with the claim. Stonebridge's representative noted that Plaintiff failed to
2 complete forms required for the release of medical records, that Exclusion 3 of the Policy prohibits
3 benefits where the injury occurs while taking a narcotic "unless used as prescribed by a physician,"
4 and that Exclusion 7 prohibits payment of benefits where the injury is due to disease or treatment of a
5 medical condition. Finally, Stonebridge told Plaintiff that the Proof of Loss provision generally
6 requires the beneficiary to provide notification within 30 days and proof of the loss within 90 days
7 and in all cases requires proof of loss within one year unless there is an "absence of legal capacity."

8 Stonebridge asked Plaintiff to provide additional information, including contact information
9 for the physician who prescribed Mr. Butte's methadone, autopsy, toxicology, and coroner's reports,
10 and information on whether Mr. Butte had taken the methadone as prescribed. Stonebridge also
11 asked for "documentation evidencing the absence of legal capacity." Plaintiff provided the contact
12 information of the treating physician, J. Corey Brown M.D. ("Dr. Brown") and noted that Dr. Brown
13 had been treating Mr. Butte for "severe back pain."

14 Plaintiff also addressed the "Proof of Loss" issue by stating that she delayed notifying
15 Stonebridge because she "did not know that my husband had this policy." Plaintiff realized that this
16 policy existed when she cancelled one of her own credit cards and the company informed her the
17 existence of a similar policy.

18 Stonebridge continued to investigate the claim and obtained records from the Clark County
19 Coroner's office. However, Stonebridge was unable to obtain records from Dr. Brown. Stonebridge
20 was informed that Dr. Brown's office could not locate Mr. Butte's chart. Dr. Brown's assistant told
21 Stonebridge that Dr. Brown did not recall prescribing methadone to Mr Butte.

22 Stonebridge denied the claim on December 5, 2008 based on the narcotic drug use and the
23 medical exclusions of the Policy. Plaintiff retained counsel who was able to locate medical records
24 from Dr. Brown. Some of these records indicate a methadone prescription, but none of them contain
25 dosage information. Stonebridge reviewed the information and declined to change its coverage
26 determination.

1 II. Discussion

2 A. Legal Standard for Summary Judgment

3 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
4 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
5 material fact and that the moving party is entitled to a judgment as a matter of law. See, Fed. R. Civ.
6 P. 56(a); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
7 initial burden of showing the absence of a genuine issue of material fact. See, Celotex, 477 U.S. at
8 323.

9 The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
10 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
11 587 (1986); Fed. R. Civ. P. 56(e). “[U]ncorroborated and self-serving testimony,” without more, will
12 not create a “genuine issue” of material fact precluding summary judgment. Villiarimo v. Aloha
13 Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Summary judgment shall be entered “against a
14 party who fails to make a showing sufficient to establish the existence of an element essential to that
15 party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322.

16 B. Admissibility of Insurance Policy

17 Generally, unauthenticated documents cannot be considered in a motion for summary
18 judgment. However, “the requirement that documents be authenticated through personal knowledge
19 when submitted in a summary judgment motion ‘is limited to situations where exhibits are
20 introduced by being attached to an affidavit’ of a person whose personal knowledge is essential to
21 establish the document is what it purports to be—that it is authentic.” Las Vegas Sands, LLC v.
22 Nehme, 632 F.3d 526, 533 (9th Cir. 2011) (quoting Orr v. Bank of Am., NT & SA, 285 F.3d 764,
23 773 (9th Cir.2002)). Under Rule 901(b)(4), “documents ... could be authenticated by review of their
24 contents if they appear to be sufficiently genuine.” Orr, 285 F.3d at 778 n. 24.

25 Plaintiff argues that the Policy attached to the Motion for Summary Judgment is not
26 authenticated and thus cannot be considered. Defendant has not provided a declaration

1 authenticating the document. Furthermore the Policy is referenced in Plaintiff's complaint and is the
 2 basis of the allegations against Defendant. Accordingly, lack of authentication is not a reason to
 3 exclude the Policy from consideration in resolving this Motion for Summary Judgment.

4 C. Receipt of the Policy

5 The policy at issue here appears to be a franchise policy governed by Nevada Revised Statute
 6 689A. See Hummel v. Continental Cas. Ins. Co., 254 F.Supp.2d 1183, 1187 (D.Nev. 2003) (holding
 7 that similar policy offered to account holders of bank was a franchise policy). NRS 689A.170
 8 requires insurers to deliver a copy of the policy to the insured for inspection and NRS 689A.400
 9 requires insurers to deliver a copy of a state-approved disclosure indicating, *inter alia*, exclusions to
 10 the policy. Several courts have held that an insurer could not enforce an exclusion in an insurance
 11 policy when the insurer failed to comply with a statutory requirement of delivery of the policy to the
 12 insured at the time the policy is issued. See General Motors Acceptance Corp. v. Martinez, 668 P.2d
 13 498, 501 (Utah 1983) (prohibiting an insurance company from "accept[ing] "premiums and then
 14 den[ing] liability on the ground of an exclusion of which the insured was not aware because the
 15 insurance company had never informed him of the exclusion...); Robinson v. Volunteer State Life
 16 Ins. Co., 175 Ga.App. 292, 333 S.E.2d 171 (1985) (insurer cannot enforce exclusion of coverage for
 17 disability caused by a pre-existing condition); Investor's Nat'l Life Ins. Co. v. Norsworthy, 160
 18 Ga.App. 340, 287 S.E.2d 66 (1981) (same); Gardner v. League Life Ins. Co., 48 Mich.App. 574, 210
 19 N.W.2d 897, 898 (1973) (similar; otherwise, insurer could engage in improper "post-claim
 20 underwriting"). Nevada courts have not specifically addressed this issue. However, the Court
 21 believes that Nevada would prohibit insurers from applying exclusions of which the insured had no
 22 notice.¹

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 25 ¹ In the absence of state law on point, "th[e] court must predict how the Nevada Supreme Court would decide
 26 this issue 'using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and
 restatements as guidance.' " Great Am. Ins. Co. v. N. Am. Specialty Ins. Co., 542 F.Supp.2d 1203, 1211 (D.Nev.2008)
 (quoting Arizona Elec. Power Co-op v. Berkeley, 59 F.3d 988, 991 (9th Cir.1995)).

1 Plaintiff claims that she and her husband never received copies of the Policy indicating the
2 exclusions and notice requirements. Defendant has submitted a declaration by Stonebridge
3 Employee Ben Bennet who is currently the New Business Telemarketing and Fulfillment Manager.
4 Mr. Bennet states the current practice of Stonebridge with regard to “telephone sales” is to deliver
5 the policies to the insured, create a record of policies that are returned by the postal service, and
6 obtain correct address information for re-mailing. Further, Mr. Bennet states that the file relating to
7 Mr. Butte’s policy does not indicate that it was returned by the postal service. However, Mr. Bennet
8 does not state that the practice he describes was in place at Stonebridge in 2001 when Mr. Butte
9 obtained the Policy. Mr. Bennet’s description is for telephone sales. Mr. Butte’s Policy was fulfilled
10 by mail through a credit card offer. Mr. Bennet does not specify the practice used for policies
11 originated in this way. In opposition, Plaintiff has submitted an affidavit stating that it was her
12 practice throughout her 25-year marriage to Mr. Butte, including in 2001, to open all incoming mail,
13 respond to letters, and keep any important documents that arrived by mail. Plaintiff attests that on
14 occasions when her husband did open a letter, he would leave its contents for her to respond to and
15 keep.

16 There is a dispute of fact about whether the Policy was delivered to Mr. Butte. This fact is
17 material because Defendant cannot seek to apply the exclusions of the Policy without showing that
18 the Policy was delivered to Mr. Butte. Summary judgment cannot be granted when a material fact is
19 in dispute. Accordingly, Defendant’s Motion for Summary Judgment is denied.

20 D. Claim for Bad Faith and Punitive Damages

21 When there is a genuine dispute regarding an insurer’s legal obligations, the district court can
22 determine if the insurer’s actions were reasonable. Allstate Ins. Co. v. Miller, 125 Nev. 300, 317
23 (Nev. 2009). Insurers are not liable for bad faith for “being incorrect about policy coverage as long
24 as the insurer had a reasonable basis to take the position that it did.” Pioneer Chlor Alkali Co., Inc. v.
25 National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 863 F.Supp. 1237, 1242 (D.Nev. 1994).
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1 Further, to recover punitive damages, plaintiff must also show evidence of “oppression, fraud, or
 2 malice, express or implied.” United Fire Ins. Co. v. McClelland 105 Nev. 504, 512, 780 P.2d 193,
 3 198 (Nev. 1989) (citing NRS 42.010 and quoting United States Fidelity v. Peterson, 91 Nev. 617,
 4 620, 540 P.2d 1070, 1072 (1975)). Oppression is “a conscious disregard for the rights of others
 5 which constitute[s] an act of subjecting plaintiffs to cruel and unjust hardship. Ainsworth v.
 6 Combined Ins. Co. of America, 104 Nev. 587, 591, 763 P.2d 673, 675 (Nev. 1988) (quotations
 7 omitted).

8 Stonebridge argues that it has proffered adequate explanations for its denial of coverage
 9 based on the exclusions, lack of medical records, and the delay in notification and proof of loss.
 10 Plaintiff has provided no evidence showing a dispute of fact about whether Stonebridge lacked a
 11 reasonable basis for denying the claim. Stonebridge’s denial of the claim did not constitute bad faith
 12 since Stonebridge had a reasonable basis for denying the claim. Accordingly, the summary judgment
 13 is granted in favor of Stonebridge on the cause of action for bad faith and the claim for punitive
 14 damages.

15 III. Counter-Motion for Summary Judgment

16 The deadline for filing dispositive motions in this case was July 11, 2011 (#19). Plaintiff’s
 17 Counter-Motion for Summary Judgment was filed on August 18, 2011. Further, Plaintiff failed to
 18 comply with Local Rule 56-1 which requires that motions for summary judgment contain “a concise
 19 statement setting forth each fact material to the disposition of the motion with the party claims is or is
 20 not genuinely in issue...” Plaintiff’s untimely motion seeks summary judgment on the issue of
 21 whether Stonebridge was prejudiced by Plaintiff’s delay in providing proof of loss under the Policy.
 22 The fact of whether prejudice occurred is disputed by the parties. Accordingly, Plaintiff’s Counter-
 23 Motion for Summary Judgment is denied.

1 IV. Conclusion

2 **IT IS HEREBY ORDERED THAT** Defendant Stonebridge Life Insurance Company's
3 Motion for Summary Judgment (#25) is **DENIED**.

4 **IT IS FURTHER ORDERED THAT** Plaintiff's Counter-Motion for Partial Summary
5 Judgement (#30) is **DENIED**.

6 DATED this 30th day of March 2012.

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10 Kent J. Dawson
United States District Judge
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